United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7371

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

Docket No. 75-7371

ROGER A. VAN DAMME AND
OLGA VAN DAMME,

Plaintiff-Appellant

vs.

WILLIAM F. McDOUGALL AND THE
NATIONAL CAR RENTAL SYSTEM, INC.,

Defendant-Appellee

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF PLAINTIFF—APPELLANT

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SECTION 14-242. TURNS RESTRICTED. SIGNALS TO BE GIVEN. STOPPING. U-TURNS. LEFT TURNS

(See main volume for text of (a) to (d)

(e) The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or within the area formed by the extension of the lateral lines of the private alley, road or driveway across the full width of the public highway with which it intersects, or so close to such intersection of public highways or to the area formed by the extension of the lateral lines of said private alley, road or driveway across the full width of the public highway as to constitute an immediate hazard.

SECTION 14-245. INTERSECTION. RIGHT OF WAY.

As used in this section and subsection (e) of section 14-242, "Intersection" means the area common to two or more highways which cross each other. Each driver of a vehicle approaching an intersection shall grant the right of way at such intersection to any vehicle approaching from his right when such vehicles are arriving at such intersection at approximately the same time, unless otherwise directed by a traffic officer.

SECTION 14-299(b)(4)

Green arrow: Vehicular traffic facing a green arrow signal, shown alone or in combination with another indication, may cautiously enter the intersection only to make the movement indicated by such arrow, or such other movement as is permitted by other indications shown at the same time, but such vehicular traffic shall yield the right of way to pedestrians lawfully within a crosswalk and to other traffic lawfully within the intersection.

II. PRELIMINARY STATEMENT

This is an appeal from the failure by the Trial Judge, The Honorable Thomas F. Murphy, United States District Judge, District of Connecticut, in an unreported decision, to grant Appellants' Motion to Set Aside a jury verdict in the instant matter.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The plaintiffs claim that the jury's verdict ought to be set aside and a new trial ordered for the following reasons:

A. Material errors in the Court's Charge to the Jury.

B. Closing argument by defense counsel.

C. Rulings by the Trial Judge on counsel's objections.

D. The verdict is contrary to the evidence.

IV. STATEMENT OF THE CASE AND FACTS:

The plaintiff ROGER VanDAMME was the operator and the plaintiff OLGA VanDAMME a passenger in an automobile which was involved in a serious motor vehicle intersection collision involving the defendants' motor vehicle on September 29, 1972 in Milford, Connecticut. As a result of the collision, the plaintiff, ROGER VanDAMME sustained serious and permanent head injuries causing, inter alia, retrograde amnesia. Only two known eyewitnesses were available to testify as to the facts of the accident when the case was brought on for trial at the United States District Court for the District of Connecticut at Waterbury, Connecticut on May 27, 1975. These witnesses were the plaintiff OLGA VanDAMME, a passenger in one vehicle, and the defendant WILLIAM F. McDOUGALL, the operator of the other vehicle. After a brief trial of less than one day's duration, a jury verdict in favor of the defendants was returned for which a judgment has been entered by the Court, The Honorable Thomas F.Murphy, despite a Motion by the plaintiffs to set aside the verdict.

NOTE: All references herein to pages in the transcript (TR) refer to transcript pages, as numbered, in the JOINT APPENDIX, Page 18, et seq.

V. ARGUMENT:

This was a very basic case involving two motor vehicles which collided at an intersection. The defendant, contrary to the law, turned left without stopping in front of the plaintiff's vehicle at an intersection, even though he saw the plaintiff's vehicle approaching him 50 feet away. The collision resulted from his negligence. It's simplicity was reflected in the time it took to try the case. However, this did not in any measure reflect the severity of the case because of the very serious head injuries sustained by the plaintiff-operator, ROGER VanDAMME (see Exhibit photos of car). These head injuries rendered him unable to testify as to the cause of the accident (TR 51, 52). Therefore, the preponderance of the evidence as to the facts surrounding the collision were elicited from the defendant McDOUGALL (TR 6-16; 23-25). There was no evidence presented that there were any other witnesses to the accident. Defendant himself denied there being any other witnesses (TR 24). There was no evidence of contributory negligence of the plaintiff-driver ROGER VanDAMME during the brief trial. Therefore, the primary issue in the case was the negligence of the defendant driver McDOUGALL.

Interrogatories were submitted to the jury and in response thereto they found the defendant to be not negligent. This

plaintiffs claim was so contrary to both the facts and the law of the case that it must have been due to either the charge given to the jury by the Judge or due to prejudicial comments made in closing arguments by counsel for defendants in making reference to the fact that other witnesses were not produced by the plaintiffs during trial of the case. Since the finding by the jury that the defendant-driver was not negligent, was so inconsistent, we must explore the probable reasons for that decision by the jury. They are as follows:

ERRORS IN THE COURT'S CHARGE TO THE JURY:

The plaintiffs submitted a 29 Paragraph Request to Charge to the Trial Judge (App. Nine) of which the Judge referred to only four Paragraphs in his charge (TR 65). He said he would charge as to a fifth paragraph, Paragraph 18 (App. Fourteen), which he failed to do (TR 65; 120-129). Appellants do not claim that each request must be accepted by the Court nor do they claim that the number of requests necessarily signify that they are correct or that the Court must adopt each. However, certain were particularly important here where the law of negligence and left hand turns were so important that proper instructions were needed for the jury to enable them to decide the issues. This is particularly so since in this case the issues of negligence were magnified beyond the usual proportions since there was no question of damages to be considered by the jury and negligence was the only issue. Notwithstanding the importance of the charge where it relates to negligence,

and considering the brevity of the trial, the plaintiffs feel that the charge contained errors of both omission and commission which most probably were substantial causative factors in the jury reaching its improbable verdict.

As to omission, I address myself to the PLAINTIFFS' REQUEST TO CHARGE (App. Nine). The Trial Judge apparently felt that plaintiffs' requests were too voluminous since he remarked both as to the number of paragraphs and the number of pages and the fact that he could be impeached were he to include them all in his charge (TR 65). No requests were submitted by defendants.

The fact of the matter is that the Requests to Charge by plaintiffs, Nos. 1 through 11, were included in plaintifts' Request because the Connecticut Supreme Court had fairly recently addressed itself to the complexities of the law of left turns into intersections in two recent cases, PINTO V. SPIGER, 163 Conn. 191; 302 A 2d 266 (1972) and TURBERT V. MATHER MOTORS, Supreme Court of Connecticut (1973), 334 A 2d 903. It is seldom when a Trial Judge has the opportunity to have such a recent definitive explanation of the law in issue in two recent cases as Judge Murphy had here. Notwithstanding, he completely ignored Requests by counsel to explain to the jury the duties of the left turning driver and the caution to be exercised by him when turning left into oncoming traffic (Requests Nos. 4, 6, 7, 8, 9, 10, 11. (App. Nine). The Court made no reference to this important aspect of the law other than the reading of two statutes, Section 14-242(e) of the CONNECTICUT GENERAL

STATUTES (TR 124) and Section 14-245 of the CONNECTICUT GENERAL STATUTES (TR 124). No explanation or clarification was given despite both TURBERT and PINTO having recently elaborated on a driver's duty before turning left into oncoming traffic. The Court completely ignored a very important statute which was directly on point. CONNECTICUT GENERAL STATUTES, Section 14-299 (b)(4) although it was mentioned prominently in several requests to charge, Nos. 7, 8, 10.

The above argument becomes particularly meaningful when one reads the defendant-driver's admission that he turned left and drove into the intersection without stopping despite his having seen the plaintiffs' car approaching "about 50 feet away" as he turned into the intersection (TR pps. 6-16; 23,24). There can be no justification of defendant's conduct in not stopping when he saw the other car coming, yet proceeded into the intersection without yielding the right of way to the plaintiffs' car, which defendant admitted was 50 feet away and coming towards him. There was no evidence in the case that would have even remotely suggested that the plaintiff-driver was driving improperly nor did the jury so find (TR 137). The jury found by their responses to the Interrogatories that the defendant-driver was "not negligent." (TR 137). This becomes even more extraordinary when the defendant-driver conceded that there were three lanes travelling in an eastbound direction towards him (TR 9) and that the collision took place almost entirely across all three lanes "almost on North Street." (TR 16). By his own testimony,

he turned left into an intersection with a green arrow (TR 14) while driving 15 m.p.h., without stopping, even though he saw another car coming towards him, also with a green light (TR 29), 50 feet in front of him. Yet, he continued into the intersection in violation of the law and the other car ran into his right side (TR 7). As a matter of law, based on his testimony, he was negligent and if the jury were given the instructions requested by plaintiffs, it would have so found.

Further, the plaintiffs asked the Judge to instruct the jury that, as a matter of law, a violation of the statutes read to them (Sections 14-242(e) and 14-245, CONNECTICUT GENERAL STATUTES), would be negligence per se (Requests to Charge, Paragraphs 13, 14, 15; App. Twelve, Thirteen). For some unknown reason, the Trial Judge refused to do so even though it is so ingrained as the common law of the State of Connecticut that the authors of the authoritative works on Connecticut Law of Torts, "THE CONNECTICUT LAW OF TORTS", Second Edition, Hon. Douglass B. Wright and John R. Fitzgerald (1968), say at p. 52, Section 38, entitled NEGLIGENCE AS A MATTER OF LAW, "In Connecticut, the unexcused violation of a statute, ordinance, or administrative regulation is negligence per se, or negligence as a matter of law. The violation of such an enactment is negligence per se if the plaintiff is within the class of persons whom the statute was intended to protect and if the harm was of the type that the enactment was intended to

prevent." pps. 52, 53. Not only did plaintiffs spell out the law clearly in three paragraphs of their Request to Charge (Paragraphs 13 through 15), but counsel even tried to dissuade the Judge from committing error after the charge, but to no avail (TR 130, 131).

Further, to avoid any confusion in the minds of the jurors, plaintiffs specifically requested the Judge to charge that of those allegations of negligence specifically spelled out in the Complaint, proof of violation of any one of them is sufficient for a jury to find the defendant negligent (Request to Charge, Par. 28, App. Sixteen). This is the law of Connecticut and plaintiffs can think of no justification for the Court not so charging the jury, particularly in light of the fact that by the defendant's own testimony, there was ample evidence for the jury to find, indeed they almost had to find, that he violated at least one of them. See HOFFMAN V. THE MOHICAN CO., 135 Conn. 392, 395; 71 A 2d 921, 922.

Considering that almost the entire account of the accident came from the defendant's own testimony and considering that he testified as he did as to how the accident happened (TR pps. 6 through 16), it seems almost certain that had the jury been charged on negligence per se or the fact that proof of only one of several allegations of negligence in the Complaint would allow a verdict for plaintiffs; and had the Court not ignored the requested explanation and elaboration on the duty created by the left turn statutes, the jury would have found

for the plaintiffs. This is particularly true in light of the fact that what the Judge did tell them was so brief and incomplete as to leave to them their own interpretation as to the law of the case, as opposed to getting it from the Trial Judge. This seems clearly to be reversible error.

Not only did the Court clearly leave out important, substantive law which Appellants asked him to charge, that which he did charge was error. I have already addressed myself to the Judge's inadequate description of Negligence (TR pps. 123, 124) as mentioned previously. To properly charge on both statutory and common law negligence, the Court most certainly should have elaborated more than it did. In addition, that which it did give was not only inadequate, but wrong in certain material respects.

First, the Court charged in contributory negligence even though there was no evidence of same. The Court was asked to charge that there was no evidence of contributory negligence (Request to Charge, Par. Sixteen, App. Thirteen). This plaintiffs feel was particularly harmful since there was no evidence of contributory negligence in the case. Also, the fact that the Court felt that Connecticut had a Guest Statute, which it did not, and questioned the plaintiff OLGA VanDAMME along those lines, was also harmful (TR 30-33; 57,58). Of more harmful significance is the fact that the Court charged about an inference which the jury could draw from the fact that the plaintiffs called only two witnesses to the accident (TR 128).

Under Connecticut law, this charge was both legally incorrect and factually so, since there was no evidence in the case that there were any other witnesses, and in Connecticut, in order to warrant a charge on the inference raised by the failure of a party to call a vital and necessary witness thereby allowing a jury to infer that the witness' testimony would be harmful to the party, SECONDINO V. NEW HAVEN GAS CO., 147 Conn. 672; 165 A 2d 598 (1960), the party who claims the inference must first submit evidence that the witness was available to testify. There was no such evidence in this case. STATE V. COBBS, 164 Conn. 402; 324 A 2d 234 (1973); QUEEN V. GAZIOLA, 162 Conn. 164; 292 A 2d 890 (1972). On the contrary, see defendant's testimony that there were no other witnesses (TR 24).

In this case, the charge by the Judge as to the inference, coupled with counsel's remarks about absent witnesses in his closing argument, to which counsel for the plaintiffs properly objected, had the double-barrel effect of creating a doubt in the jury's mind as to why there were no more witnesses. The suggestion that plaintiffs' failure to produce other witnesses both by the Trial Judge and by counsel was materially prejudicial to plaintiffs. As a matter of fact, considering that plus the self-damaging testimony by the defendant, the lack of any evidence as to contributory negligence of the plaintiff-driver, and the materially incorrect charge by the Judge to the jury, plaintiffs feel that the bizarre verdict by the jury must have been as a direct result of a combination of one or more of the errors alleged in this Appeal.

CLOSING ARGUMENTS BY COUNSEL:

In this case, as previously mentioned, only two eye-witnesses to the accident testified as to the occurrence itself. In addition, an engineer testified (Mr. Fitzgerald) as to the physical layout of the intersection and the directions of travel according to the compass. He used two documents, a map and a photograph, to illustrate his testimony, both Exhibits. There was no evidence that there were any other witnesses to the accident. There was testimony that the police arrived at the scene after the accident and one of the photographs of the accident scene showed a policeman directing traffic in the intersection, but that was also after the accident.

Notwithstanding the above, counsel for defendants made a very prejudicial argument, over objection of counsel for the plaintiffs, that the jury should ask themselves why the police officers were not called to testify as to the accident (TR 106-110; 113, 114). He not only suggested but actually asserted to the jury that plaintiffs were doing something wrong by not calling the police officers to testify, despite the fact that there was absolutely no evidence that any police officers were witnesses to the accident. Counsel for the plaintiffs objected strenuously to this type of comment only to be overruled twice by the Trial Judge (TR 106, 110, 113, 114). Not only were these comments inflammatory, and prejudicial, but they were condoned by the Trial Judge, who strengthened

their damage by overruling the exceptions made by counsel and by adding damaging comments to his ruling (TR 107, 108, 109, 113, 114). As briefed above, these comments and the ruling by the Trial Judge were totally at odds with the case law of the State of Connecticut regarding witnesses.

Counsel for defendants in his arguments also made reference to plaintiffs not explaining "construction" at the site of the accident (TR 112, 113). This was extremely prejudicial since there was no evidence in the case that there was any construction at that place at the time of the accident. This was also objected to by counsel for plaintiffs, but to no avail (TR 113, 114).

One of the peculiarities in a case where there is unusually little evidence as to an incident, is that the evidence that is presented is largely magnified and subject to microscopic scrutiny. This is so because of the fact that there will usually be a short trial and the evidence can be carefully and closely studied by the jury. In this case, this was ideal for plaintiffs since all of the evidence was favorable to the plaintiffs. Defendants knew this and decided strategically to offer "phantom" evidence to divert the attention and distract the jurors from the hard evidence. This fact, coupled with the sanction of the Judge and his comments in not sustaining plaintiffs' objections created reasonable doubt in the jurors' minds as to the true facts and caused them to be skeptical. Hence, the unlikely verdict.

As evidence of this, see the jury question posed during deliberations given to the Trial Judge for his assistance (TR 132). This is concrete evidence that all the fuss and diversion relative to police officers did indeed have a confusing affect on the jury causing them to ask a question about the effect of a police officer directing traffic at the intersection at the time of the accident, when indeed there was no such officer at the intersection at the time of the accident, and there was absolutely no evidence of that in the case (TR 134, 135, 136). What could be more indicative of plain error by defendants' counsel's comments than the very fact that the jury asked a question about evidence not even properly in the case, but improperly suggested by counsel, over objections, during closing arguments. This, coupled with the Judge's improper charge as to inferences must have been very damaging to plaintiffs' case, and in a material way.

VERDICT CONTRARY TO THE EVIDENCE:

This trial was, as indicated previously, very brief, less than one full day. It was very uncomplicated, almost unusually so. There was no basis for the jury to find the plaintiff contributorily negligent nor did they do so, since there was absolutely no evidence of contributory negligence on the part of the plaintiff-driver. Further, the Interrogatories themselves showed that the jury never got to the issue of contributory negligence since they found the defendant free

of negligence and went no further. This, based on the evidence, had to be for one or more of the following reasons:

A. Failure of the Court to fully and completely explain the law of the case to them, including the law of inferences, intersections and negligence.

B. Prejudicial comments by the defendants' counsel as to facts not in the case, as condoned by the Trial Judge, who added his own gratuitious comments embellishing counsel's prejudicial remarks.

C. Other errors referred to herein.

A literal reading of the testimony of the defendant-driver, particularly his repeated reiterations of his own personal account of the accident (TR 6-16; 23-25), coupled with the testimony of the plaintiff OLGA VanDAMME, could leave no doubt that:

A. Both vehicles, one travelling east and one west (defendant), had a green light at the intersection;

B. The defendant saw the plaintiffs' car at all times as he approached and entered the intersection;

C. The defendant never stopped his truck or slowed down below 15 m.p.h.;

D. The defendant continuously moved into the intersection despite his seeing the plaintiffs' car approaching within 50 feet from him; and

E. The collision took place well into the plaintiffs'

lane, the third, or furthermost lane, by the defendant's own testimony.

If the Judge had charged the jury as requested and agreed with plaintiffs that:

A. The intersection statute needs some explanation as to the TURBERT and PINTO cases;

B. There is also common law of negligence needing an explanation;

C. There were several allegations of negligence in the Complaint, violation of any one of which would be negligence by defendants and would suffice to allow a verdict for the plaintiffs;

D. There was no proper foundation in fact or law for defense counsel's closing arguments as to missing witnesses;

E. A violation of the State traffic law must result in a finding of negligence;

F. Many of the other Requests to Charge by plaintiffs ought to have been presented to the jury, he would agree that there could be no sound or logical basis for the decision of the jury other than error by the Court and comments by counsel, as referred to herein, and the Motion to Set the Verdict Aside would have been granted. Whether or not the Trial Judge erred is up to this Court to decide. We feel he erred, and materially so.

IV. CONCLUSION:

The Appeal ought to be sustained and the case returned for a new trial.

RESPECTFULLY SUBMITTED,

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